

Environmental Integrity Project • Clean Water Action • Earthjustice • Sierra Club

July 26, 2013

Sent Via Email

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
hq.foia@epa.gov

RE: **Requesting Expedited Processing**
Freedom of Information Act Request Re Steam Electric Power Generating Category
Effluent Limitation Guidelines

Dear FOIA Officer:

This is a request for information on behalf of Environmental Integrity Project, Earthjustice, Clean Water Action, and Sierra Club (collectively, Public Interest Groups) pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Environmental Protection Agency's (EPA) FOIA regulations, 40 C.F.R. § 2.107. This request is focused on information related to the EPA's proposed effluent limitation guidelines for the Steam Electric Power Generating Category (Steam Electric ELGs or Steam Electric ELGs Rule).

The Public Interest Groups request a fee waiver and expedited processing for this request.

I. Records Requested

Coal-fired power plants are by far the largest dischargers of pollution in the United States, dumping billions of pounds of arsenic, selenium, chromium, and other dangerous pollution into our rivers, streams, and lakes each year.¹ The current Steam Electric ELGs have not been revised since 1982 and contain no limits for metals associated with coal combustion waste discharges.² EPA has stated that the current standards “do not adequately address the pollutants being discharged and have not kept pace with changes that have occurred in the electric power industry over the last three decades.”³ Without federal standards to reduce or eliminate these discharges, state permitting agencies routinely fail to set any limits on this pollution. In fact, nearly 70% of discharge permits for coal-fired power plants allow unlimited discharges of arsenic, boron, cadmium, mercury, and selenium in violation of the Clean Water Act.⁴ EPA has

¹ See Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category; Proposed Rule, 78 Fed. Reg. 34,432 (June 7, 2013).

² See 40 C.F.R. Part 423.

³ 74 Fed. Reg. 55,837, 55,839 (Oct. 29, 2009).

⁴ EIP et al., Closing the Floodgates: How the Coal Industry is Poisoning Our Water and How We Can Stop It (July 23, 2013), available at http://www.environmentalintegrity.org/news_reports/07_23_2013.php

made clear that affordable treatment technologies are available to clean up and, in some cases, eliminate these dangerous and illegal discharges.⁵ Thus, strong national standards to curb water pollution from coal-fired power plants are critical to protect public health and the environment.

On June 7, 2013, EPA published a proposed rule to strengthen the controls on discharges from steam electric power plants by revising technology-based effluent limitations guidelines and standards for the Steam Electric Power Generating point source category. In the proposed rule, EPA introduced several options to control toxic discharges from coal-fired power plants and estimated the costs, pollutant loading reductions, and public health and environmental impacts associated with each option. The Public Interest Groups intend to participate in the rulemaking process and require timely access to the technical data that provides the support for the Steam Electric ELGs Rule. The Public Interest Groups therefore request the following records:

1. All plant-level loadings data related to the pollutant loadings and removals calculations in section 10 of the Technical Development Document for the Proposed Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, including, but not limited to DCN SE03582, SE03583, SE03584, and SE03585.
2. 303(d) Impaired Waters Proximity Database (DCNSE03566)
3. 303(d) Impaired Waters National Data (DCNSE03556)
4. 303(d) Impaired Waters Cause Summary (DCN SE03557)
5. Proximity Analysis Methodology Memorandum (DCN SE02151)
6. Appendix to Incremental Costs and Pollutant Removals for Proposed Effluent Limitation Guidelines and Standards for the Steam Electric Generating Point Source Category Report (DCN SE03581)
7. Performance data information cited in Sections 2, 3, and 5 of the ERG Memorandum dated April 23, 2012 (DCN SE03867)
8. Bromide sampling data that is referenced in Table 4-6 on page 4-25 of EPA's Steam Electric Power Generating Point Source Category: Final Detailed Study Report (Oct. 2009)

For purposes of this request, the term "records" means information of any kind, including, but not limited to, documents (handwritten, typed, electronic or otherwise produced, reproduced, or stored), letters, e-mails, facsimiles, memoranda, correspondence, notes, databases, drawings,

⁵ See, e.g., Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 78 Fed. Reg. 34,432 (June 7, 2013). See also U.S. Env'tl. Prot. Agency, Steam Electric Power Generating Point Source Category: Final Detailed Study Report (EPA 821-R-09-008) (Oct. 2009), available at <http://www.epa.gov/waterscience/guide/steam/finalreport.pdf>.

graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained.

We remind you that FOIA requires that you respond within 20 days of your receipt of this request, *see* 5 U.S.C. § 552(a)(6)(A)(i), and that that response must “at least indicate within the relevant time period the scope of the documents [you] will produce and the exemptions[, if any, you] will claim with respect to any withheld documents.” *Citizens for Responsibility and Ethics in Washington v. F.E.C.* 711 F.3d. 180, 182-83 (D.C. Cir. 2013).

We ask that you disclose this information as it becomes available to you without waiting until all of the communications and records have been assembled for the time period requested. The Public Interest Groups request electronic copies of the records whenever possible.

II. Claims of Exemption from Disclosure

If EPA regards any documents as exempt from required disclosure under the Freedom of Information Act, please identify each allegedly exempt record in writing, provide a brief description of that record, and explain the agency’s justification for withholding it. This explanation should take the form of a *Vaughn* index, as described in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973) and other related cases. If a document contains both exempt and non-exempt information, please provide those portions of the document that are not exempted from disclosure. Finally, if a document does not exist, please indicate that in your written response.

III. Fee Waiver

Pursuant to 5 U.S.C. § 552(a)(4)(iii) and 40 C.F.R. § 2.107, the Public Interest Groups request that EPA waive all fees associated with responding to this request because the groups seek this information in the public interest and will not benefit commercially from this request. If EPA does not waive the fees entirely, the Public Interest Groups request that it reduce them to the extent possible.

FOIA provides that fees shall be reduced “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”⁶ EPA’s FOIA regulations contain an identical requirement.⁷ The U.S. Department of Justice (DOJ) has identified six factors to assess whether a requester is entitled to a waiver of fees under

⁶ 5 U.S.C. § 552(a)(4)(iii).

⁷ 40 C.F.R. § 2.107.

FOIA, and the D.C. Circuit and other Courts of Appeals reference and apply these factors.⁸ These factors are:

A. Disclosure of the Information ‘is in the Public Interest Because it is Likely to Contribute Significantly to Public Understanding of the Operations or Activities of the Government.’

(1) **The subject of the request:** Whether the subject of the requested records concerns ‘the operations or activities of the government’;

(2) **The informative value of the information to be disclosed:** Whether the disclosure is ‘likely to contribute’ to an understanding of government operations or activities;

(3) **The contribution to an understanding of the subject by the general public likely to result from disclosure:** Whether disclosure of the requested information will contribute to ‘public understanding’; and

(4) **The significance of the contribution to public understanding:** Whether the disclosure is likely to contribute ‘significantly’ to public understanding of government operations or activities.

B. Disclosure of the Information ‘is Not Primarily in the Commercial Interest of the Requester.’

(1) **The existence and magnitude of a commercial interest:** Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(2) **The primary interest in disclosure:** Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is ‘primarily in the commercial interest of the requester.’⁹

The Public Interest Groups’ request complies with each of the factors agencies weigh in a fee waiver determination, as demonstrated below. If this information is not sufficient to justify a fee waiver, please contact us for further documentation before deciding upon the waiver request.

⁸ See, e.g., Stephen J. Markman, U.S. Dep’t of Justice, FOIA Update, Vol. VIII, No. 1, New Fee Waiver Policy Guidance at 3-10 (1987), available at http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm; *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (stating that “for a request to be in the ‘public interest,’ four criteria must be satisfied,” and citing agency’s multi-factor fee waiver regulation).

⁹ See Markman, *supra* note 8.

A. Public Interest Factor

The disclosure of this information is in the “public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.”¹⁰ The Public Interest Groups’ request complies with each of the criteria DOJ has identified for the public interest factor.

i. The request concerns the operations or activities of the government.

The Public Interest Groups’ seek technical data EPA has relied on to support the Steam Electric ELGs Rule. Since EPA is an arm of the federal government, there is no question that the information related to the rulemaking is an “operation[] or activit[y] of the government.”¹¹

ii. The disclosure is “likely to contribute” to an understanding of government operations and activities.

The technical data the Public Interest Groups have requested bear upon the legal, scientific, and technical basis for EPA’s proposed Steam Electric ELGs Rule. As such, these records are of vital importance to evaluating the proposed rule and are necessary for the public to critically assess and fully evaluate EPA’s proposal to control toxic discharges from coal-fired power plants. Thus, disclosure is “likely to contribute” to public understanding.¹²

iii. The information will contribute to the understanding of the general public.

This information will contribute to the understanding of the general public.¹³ The general public is already following issues related to water pollution from coal-fired power plants. For example, EPA received approximately 450,000 comments on a proposed rule to regulate coal ash disposal.¹⁴ And water pollution from coal-fired power plants has routinely been the focus of investigative reports by members of the media.¹⁵ Thus, EPA’s Steam Electric ELGs Rule will receive close and critical scrutiny from members of the public and the news media.

The Public Interest Groups are particularly able to ensure that the information requested will be disseminated to the general public. The Sierra Club is the nation’s oldest and largest grassroots environmental organization, with nearly 600,000 members and hundreds of thousands additional online activists and newsletter subscribers. Its website is highly trafficked and Sierra Club media and communications reach hundreds of thousands of people through a radio show, an extensive online information system, web videos, and news reports.

¹⁰ See 40 C.F.R. § 2.107(l)(2)(i).

¹¹ *Id.*

¹² See 40 C.F.R. § 2.107(l)(2)(ii).

¹³ See 40 C.F.R. § 2.107(l)(2)(iii).

¹⁴ See, e.g., Kristen Lombardi, The Center for Public Integrity, *As EPA Delays New Coal Ash Rules, Residents Turn to the Courts for Relief*, Feb. 22, 2013, available at <http://www.publicintegrity.org/2013/02/22/12223/epa-delays-new-coal-ash-rules-residents-turn-courts-relief>.

¹⁵ See, e.g., Charles Duhigg, N.Y. Times, *Cleansing the Air at the Expense of Waterways*, Oct. 12, 2009, available at <http://www.nytimes.com/2009/10/13/us/13water.html>.

The Sierra Club's Beyond Coal campaign is a multi-million dollar effort to "replace dirty coal with clean energy by mobilizing grassroots activists in local communities to advocate for the retirement of old and outdated coal plants and to prevent new coal plants from being built."¹⁶ As part of its campaign, Sierra Club has prioritized its efforts to ensure that coal-fired power plants comply with the Clean Water Act and other environmental laws, and has an active communications, organizing, and litigation campaign to further these efforts. The campaign participates in dozens of proceedings annually, has a large communications budget, and communicates weekly with tens of thousands of citizens. Campaign experts and attorneys use available information to develop reports, media materials, and litigation briefs that further educate the public and decision-makers. Through that campaign, Sierra Club has built an extensive national network of public organizations and individuals interested in these issues, and it communicates with them regularly.

Earthjustice is a non-profit public interest law organization dedicated to protecting the magnificent places, natural resources, and wildlife of this earth, and to defending the right of all people to a healthy environment.¹⁷ Earthjustice has made safeguarding the nation's waters one of its top. To this end, Earthjustice has brought numerous lawsuits to enforce the Clean Water Act in the public interest. In light of its substantial legal expertise, Earthjustice is well-prepared to analyze and evaluate the records we receive pursuant to this request and assess them in the context of the statutory mandates of the Clean Water Act. In addition, Earthjustice has the "ability and intention" to convey this information to the public.¹⁸ Earthjustice can publicize information received from this request in its monthly electronic newsletter, which serves approximately 223,000 subscribers, and it can utilize its online action alert system to urge members of the public to contact policymakers and ask them to take action based on information received from this request; typically, 15,000 to 20,000 individuals respond to such alerts. Earthjustice's communications staff can disseminate newsworthy information obtained from this request to the media, and Earthjustice's lobbyists can provide relevant information obtained from this request to elected officials in Washington.

Clean Water Action is a non-profit, non-partisan public interest organization. One of the nation's largest grassroots environmental organizations, it was founded to protect the environment, health, economic well-being, and community quality of life by promoting safe water and preventing health threatening pollution. Clean Water Action has continuously worked to strengthen and preserve key drinking water protections and protect small streams and wetlands. With over one million members, Clean Water Action has led hundreds of successful campaigns in dozens of states around the country. Clean Water Action disseminates information on its website by blogging, publishing monthly newsletters, reports, and scorecards on both state level and national issues. The organization is therefore capable of making the information from this request available to at least one million people around the country, as well as to relevant members of Congress and other elected officials.

¹⁶ See <http://content.sierraclub.org/coal/about-the-campaign>.

¹⁷ See <http://earthjustice.org/about>.

¹⁸ See, e.g., Markman, *supra* note 8.

The Environmental Integrity Project (EIP) is a non-profit, non-partisan public interest law organization that was founded to advocate for the effective enforcement of environmental laws that pertain to coal-fired power plants and other large sources of pollution.¹⁹ EIP's three objectives are to: (1) provide objective analysis of how the failure to enforce or implement environmental laws increases pollution and affects the public's health; (2) hold federal and state agencies, as well as individual corporations, accountable for failing to enforce or comply with environmental laws; and (3) help local communities in key states obtain the protection of environmental laws. EIP participates in federal and state rulemakings related to water pollution from the utility industry and brings lawsuits to enforce the Clean Water Act on behalf of community and environmental groups that are harmed by coal plant pollution. In addition, EIP uses public data to develop reports, media materials, and litigation briefs that educate the public and decision-makers, and achieve its objectives. For example, EIP, in coordination with Earthjustice, Sierra Club, and other public interest groups, has released several reports documenting water pollution from coal-fired power plants.²⁰ Most recently, the Public Interest Groups released a detailed report on the dire need for a strong Steam Electric ELGs Rule.²¹ These reports are published on EIP's website.

The Public Interest Groups will make all documents publicly available and will use them as the bases for reports and comments on EPA's Steam Electric ELGs Rule. Thus, the Public Interest Groups are uniquely well positioned to analyze and publicize the information it requests.

iv. The information will contribute “significantly” to public understanding of government operations or activities.

The information the Public Interest Groups seek will contribute “significantly” to the ongoing public conversation about water pollution from coal-fired power plants.²² None of the materials the groups have requested are now widely known (if they have been made public at all), yet they are essential to evaluating the basis for EPA's Steam Electric ELGs Rule. As discussed above, these materials will allow the public and independent experts to critically evaluate EPA's proposal and provide meaningful comments during the public comment period. Releasing this information (and doing so on a timeline which will allow the public to comment on the rule based upon these records) will, thus, significantly enhance public understanding of the basis for EPA's proposal and public participation during the public comment period.

B. Commercial Interest Factor

The Sierra Club is a non-profit organization, registered under sections 501(c)(3) and

¹⁹ See <http://www.environmentalintegrity.org>.

²⁰ See, e.g., EIP et al., Closing the Floodgates: How the Coal Industry is Poisoning Our Water and How We Can Stop It (July 23, 2013), *available at* http://www.environmentalintegrity.org/news_reports/07_23_2013.php; EIP et al., In Harm's Way: Lack of Federal Coal Ash Regulations Endangers Americans and their Environment (Aug. 26, 2010), *available at* http://www.environmentalintegrity.org/news_reports/08_26_10.php; Earthjustice et al., EPA's Blind Spot: Hexavalent Chromium in Coal Ash (Feb. 1, 2011), *available at* <http://www.environmentalintegrity.org/documents/CoalAshChromeReportFINAL.pdf>.

²¹ EIP et al., Closing the Floodgates: How the Coal Industry is Poisoning Our Water and How We Can Stop It (July 23, 2013), *available at* http://www.environmentalintegrity.org/news_reports/07_23_2013.php.

²² See 40 C.F.R. § 2.107(l)(2)(iv).

501(c)(4) of the tax code. Clean Water Action is also a non-profit organization, registered under sections 501(c)(4) of the tax code. Earthjustice and the Environmental Integrity Project are non-profit public interest law organizations. The Public Interest Groups have no commercial, trade, or profit interests in this information. The Public Interest Groups seek to use this information solely to inform the public and to support advocacy efforts around curbing dangerous and illegal discharges from coal-fired power plants. Thus, there is no relevant commercial interest here, and the request is entirely in the public interest.

For all of the foregoing reasons, a fee waiver is warranted here.

IV. Expedited Processing Request

FOIA provides that each agency shall provide for expedited processing of records where there is a “compelling need.”²³ EPA’s FOIA regulations state that requests will be “given expedited treatment whenever it is determined that such requests or appeals involve . . . an urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information”²⁴ In this case, the Public Interest Groups are “person[s] primarily engaged in disseminating information,” and there is an urgent need to inform the public about the technical data that is the basis for EPA’s proposed rule related to the Steam Electric ELGs.

A. The Public Interest Groups are Primarily Engaged in Disseminating Information.

The Public Interest Groups are primarily engaged in disseminating information and educating the public, as we have described above.²⁵ This sort of extensive media and communications operation by nonprofit organizations has regularly qualified nonprofits for expedited processing and, indeed, even to be deemed members of the “news media.” In *Electronic Privacy Information Center v. Dep’t of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003), for instance, the U.S. District Court for the District of Columbia concluded that the Electric Privacy Information Center (EPIC), a small nonprofit which had published seven books on relevant issues and had a “biweekly electronic newsletter”, qualified as a member of the news media.²⁶ The court explained that this electronic “periodical” alone qualified EPIC as a news media organization.²⁷ Such determinations are common. In *ACLU v. U.S. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004), the court held that the ACLU was entitled to expedited processing, along with EPIC, and explained that any organization which “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” meets this test.

The Public Interests Groups unquestionably do so. Their publication operations are vastly larger than that held adequate in *EPIC*, *ACLU*, and similar cases, and have already been employed to

²³ 5 U.S.C. § 552(e)(i).

²⁴ 40 C.F.R. § 2.104(e)(1)(ii).

²⁵ See discussion *infra* section III.A.iii.

²⁶ *Electronic Privacy Info. Ctr. v. Dep’t of Defense*, 241 F. Supp. 2d 5, 11-15 (D.D.C. 2003).

²⁷ See *id.* at 14-15.

educate the public on water pollution from coal-fired power plants. Thus, the Public Interest Groups qualify for expedited processing as organizations primarily engaged in public education.

B. There is an Urgent Need to Inform the Public About the Technical Basis for EPA's the Steam Electric ELGs Rule.

Coal-fired power plants discharge millions of pounds of arsenic, selenium, mercury, and other toxic pollutants into U.S. waters each year in violation of the Clean Water Act.²⁸ As discussed above, the current Steam Electric ELGs set no limits on this pollution, and States routinely ignore the mandatory legal requirement to set limits to control this pollution on a case-by-case basis in individual discharge permits.²⁹ After three decades of delay, EPA is finally taking action to curb dangerous and illegal coal-fired power plants, has issued a proposed rule, and is bound by a court-enforceable deadline to take final action no later than May 22, 2014. EPA has proposed a wide range of options to control toxic discharges from power plants, some of which are illegal and would do little to control toxic pollution from power plants.

Thus, it is critical that the Public Interest Groups and members of the public have access to the technical data EPA relies upon to support the proposed Steam Electric ELGs Rule in time for it to inform public comment due September 20, 2013. In these circumstances, there is an urgent need to inform the public of the accuracy of EPA's loadings estimates for the Steam Electric ELGs rule. If EPA does not expedite the processing of this request and disclose these records, it will have prevented the public from participating in a pressing policy debate and effectively commenting on EPA's proposed rule. Courts have repeatedly held that such a denial is an irreparable injury, so preventing such an injury through timely disclosure of the requested records demonstrates the need for expedited processing here.³⁰

C. This Request Concerns Federal Government Activity

There is no question that EPA activity related to the Steam Electric ELGs rule is federal government activity since EPA is a federal agency.

For all of these reasons, the Public Interest Groups are entitled to expedited processing. Thank you for your assistance processing this request. Please contact Jennifer Duggan at the

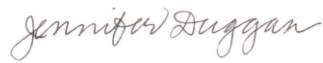
²⁸ See EPA, *supra* note 1.

²⁹ See 40 C.F.R. Part 423; EPA, Enforcement & Compliance History Online (ECHO), <http://www.epa-echo.gov/echo/>.

³⁰ See, e.g., *Electronic Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 30, 41-42 (D.D.C. 2006); *Washington Post v. Dep't of Homeland Security*, 459 F.Supp. 2d 61, 74-75 (D.D.C. 2006); *Electronic Frontier Found. v. Office of the Dir.*, No. C07-5278, 2007 WL 4208311, at *6 (N.D. Cal. Nov. 27, 2007); *Electronic Frontier Found. v. Office of the Dir.*, 542 F. Supp. 2d 1181, 1186 (N.D. Cal. 2008).

email or telephone number below if you have any questions or concerns about this request for information.

Sincerely,



Jennifer Duggan
Managing Attorney
Environmental Integrity Project
One Thomas Circle NW, Suite 900
Washington, DC 20005
(802) 225-6774
jduggan@environmentalintegrity.org

Casey Roberts
Staff Attorney
Sierra Club Environmental Law Program
85 Second Street, 2nd Floor
San Francisco, CA 94105
(415) 977-5710
casey.roberts@sierraclub.org

Thomas Cmar
Coal Program Attorney
Earthjustice
5042 N. Leavitt Street, Suite 1
Chicago, IL 60625
(312) 257-9338
tcmar@earthjustice.org

Jennifer Peters
National Waters Campaign Coordinator
Clean Water Action
1444 Eye Street NW, Suite 400
Washington, DC 20005
(202) 895-0420 ext. 105
jpeters@cleanwater.org